TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 113

ROY WEBBER TINDER, JR., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED JANUARY 17, 1953

CERTIORARI GRANTED JUNE 9, 1952

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Print 1 [Caption omitted]

17 2 [File endorsement omitted]

18 IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

19 UNITED STATES OF AMERICA

20 *v.*

26 ROY WEBBER TINDER, JR.

INDICTMENT—Filed July 10, 1950

27 The Grand Jury charges:

27 That on or about the 1st day of March, 1950, at Norfolk, Virginia, in the Eastern District of Virginia and within the jurisdiction of this Court, ROY WEBBER TINDER, JR. did unlawfully and feloniously take from the letter box or mail receptacle of one Mrs. Evelyn H. Carlisle a letter addressed to her, the said Mrs. Evelyn H. Carlisle, as 500 Botetourt Street, Norfolk, Virginia; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. (Title 18, Section 1708, U.S.C.A.)

Second Count

The Grand Jury further charges:

That on or about the 5th day of April, 1950, at Norfolk, Virginia, in the District and jurisdiction aforesaid, ROY WEBBER TINDER, JR. did unlawfully and feloniously take from the letter box or mail receptacle of one James Earl Ainsley a letter addressed to him, the said James Earl Ainsley, at 334 Boush Street, Norfolk, Virginia; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. (Title 18, Section 1708, U.S.C.A.)

Third Count

The Grand Jury further charges:

That on or about the 21st day of April, 1950, at Norfolk, Virginia, in the District and jurisdiction aforesaid, ROY WEBBER TINDER, JR. did unlawfully and feloniously take from the letter box or mail receptacle of one Joseph S. Hume a letter addressed to him, the said Joseph S. Hume, at 901 Spotswood Avenue, Norfolk, Virginia; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. (Title 18, Section 1708, U.S.C.A.)

3 Fourth Count

The Grand Jury further charges:

That on or about the 29th day of April, 1950, at Norfolk, Virginia, in the District and jurisdiction aforesaid, ROY WEBBER TINDER, JR., did unlawfully and feloniously take from the letter box or mail receptacle of one Carl F. Ward a letter addressed to him, the said Carl F. Ward, at 1712 Hampton Boulevard, Norfolk, Virginia; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. (Title 18, Section 1708, U.S.C.A.)

Fifth Count

The Grand Jury further charges:

That on or about the 2nd day of May, 1950, at Norfolk, Virginia, in the District and jurisdiction aforesaid, ROY WEBBER TINDER, JR. did unlawfully and feloniously take from the letter box or mail receptacle of one Miss Lucia D. Jordan a letter addressed to her, the said Miss Lucia D. Jordan, at Apartment C-5, 7200 Hampton Boulevard, Norfolk, Virginia; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. (Title 18, Section 1708, U.S.C.A.)

Sixth Count

The Grand Jury further charges:

That on or about the 3rd day of May, 1950, at Norfolk, Virginia, in the District and jurisdiction aforesaid, ROY WEBBER TINDER, JR. did unlawfully and feloniously take from the letter box or mail receptacle of one Jennette White a letter addressed to her, the said Jennette White, at 7200 Hampton Boulevard, Norfolk, Virginia; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. (Title 18, Section 1708, U.S.C.A.)

A True Bill:

GEO. C. HENKEL,
Foreman.

GEORGE R. HUMRICKHOUSE,
United States Attorney.

4 IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF ARRAIGNMENT AND PLEAS—July 10, 1950

William B. Eley, Assistant United States Attorney appeared for the United States and Robert Pontifex, Atty. appeared on behalf of the Defendant. Waived formal arraignment and entered a plea of guilty. Motion was made to transfer to Norfolk for hearing. Motion granted.

5 IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY OF JUDGMENT—September 13, 1950

Defendant to be committed to custody of the Attorney General or his duly authorized representative for a period of THREE YEARS on each count, unless sooner released by operation of law; sentences to run concurrently.

Memorandum: The above Minutes (transcript) of Reporter-Court-Mrs. Mary White Bible have not been written up or available as said Reporter has been incapacitated. She is Court Reporter from Charleston, W. Va.

6 [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT AND COMMITMENT—Filed September 13, 1950

On this 13th day of September, 1950, came the attorney for the government and the defendant appeared in person and by Counsel. Defendant having previously waived arraignment and entered a plea of guilty.

It is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of violation of Title 18, Sec. 1708, U.S.C.A. (Theft from Mail Receptacles) as charged in Six Counts of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for

imprisonment for a period of THREE (3) YEARS ON EACH COUNT OF THE INDICTMENT, said sentences to run concurrently, unless sooner released by operation of law.

It is adjudged that ——.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

BEN MOONEY,
United States District Judge.

The Court recommends commitment to:
(Signed) —— ——,
Clerk.

(By) —— ——,
Deputy Clerk.

7 In re:

TINDER, Roy Webber ads. United States

December 8th, 1950.

Roy Webber Tinder 70573-A,
United States Penitentiary,
Atlanta, Georgia.

Dear Sir:

Your motion to vacate and set aside and correct sentence was received here today.

Since this case is not docketed in the Richmond Division of the Court and apparently is handled by my Norfolk Office, I am forwarding your motion today to Norfolk for docketing and presentation to the Court. Any further communications you may have should be addressed to me at Federal Bldg., Norfolk 1, Virginia.

Yours very truly,

WALKLEY E. JOHNSON, *Clerk*,

by:

GLOVER N. BUCK,
Deputy Clerk.

cc: Inc. to:
Clerk's Office,
Norfolk, Va.

cc: Warden, U. S.
Penitentiary,
Atlanta, Ga.

8 IN UNITED STATES DISTRICT COURT

Department of Justice

United States Penitentiary

Atlanta, Georgia

December 6, 1950

Clerk of Courts
United States District Court
Eastern District of Virginia
Richmond, Virginia

RE: TINDER, ROY WEBBER

Reg. No. 70573-A

Motion to Vacate and Set Aside and Correct Sentence

Dear Sir:

At the request of the inmate I am forwarding for your disposition the legal papers indicated above.

Please acknowledge receipt. This may be done by return of this letter with appropriate notation thereon if you so desire.

Any reply you make to the attachment should be addressed to the inmate in care of this office.

Sincerely yours,

W. H. HIATT,
Warden.

Incl.
JW

9 IN UNITED STATES DISTRICT COURT

[Title omitted]

Criminal Case

MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE, AS REQUIRED UNDER SECTION 2255, TITLE 28, U.S.C.A.

To the Honorable, Sterling Hutchenson, Judge of the above entitled Court.

Petitioners verified Motion for Correction of Sentences

Comes now, Roy Webber Tinder, Jr.

The petitioner in the above entitled, hereinafter designated the petitioner, and moves and prays for a correction of Judgment, and Sentence, on the grounds that the State Court did not have author-

ized judisdiction of the petitioner at the time sentence was imposed. In support thereof, the petitioner moves and shows and prays the following to wit:

10

A

JURISDICTIONAL STATEMENT

Section 2255 of Title 28 U.S.C.A. provides that.

B

STATEMENT

Petitioner was arrested by F. B. I. agents on April 30th, 1950 at Norfolk, Virginia, shortly after released on bond. Indicted by Federal Grand Jury, at Newport News, Va., on July 10th, 1950, and bond continued. The trial then being set for July 28th, 1950, at which he didn't appear, and bond was forfeited. He was then re-arrested by Federal Authorities on Aug. 4, 1950, and confined in the Norfolk city jail to await trial on Sept. 13th, 1950, at which time he had no hearing as to why being tried by State.

On August 24th, 1950, he was taken from the Norfolk city jail by two agents and carried into Corporation Court No. 1, Judge Richard B. Spindle, Jr., presiding. He was tried on three separate charges of forgery and sentenced to two years in the State Penitentiary on each charge, said sentences to run concurrently. He was again returned to the Norfolk city jail for confinement.

11

ARGUMENT

(A) The petitioner feels that his constitutional rights was violated under such transactions of the said courts, being tried by the State and sentenced while awaiting trial in U. S. Federal Court, at which time the petitioner had never been tried or convicted in United States Federal Court.

(B) The petitioner feels that the State Court or the U. S. Federal Court, relinquished its jurisdiction at this point. Being released from one court to be tried by another court before the court which first had jurisdiction, had performed its duty, the petitioner feels it unconstitutional, and one of the sentences is illegal and void, and should be set aside, vacated.

12

C

FURTHER ARGUMENTS AND AUTHORITIES

A United States Court and State Court's Jurisdiction of the U. S. Federal Court and State Courts a direct interference with Federal

Jurisdiction and a violation of the Rule of Comity between Federal and State Courts.

Grant v. *Guernsey*, 10th Circuit, 63 F. 2d 163; January 23, 1933.

Criminal proceeding instituted before Justice during defendant's period of probation under Federal Court sentence, without first obtaining permission from Federal Court to be tried in State Court, held unauthorized.

Lewis, Circuit Judge.

The appellee was discharged from custody on his petition for Writ of Habeas Corpus. The facts disclosed by appellee's petition, the return order to show cause by Grant and Lewis respectively County Attorney and Sheriff of Montgomery County, Kansas, and the hearing thereon are. In Sept. 1930, Guernsey "was indicted in the United States District Court for Kansas, for violation of the Banking Act, and pleaded guilty. He was sentenced to confinement for 3½ years. The District Judge placed Guernsey on probation.

13 Thereafter Appellant Grant instituted before a Justice of the Peace in Montgomery County, a criminal proceeding, charging Guernsey with embezzlement, committed prior to his sentence in the Federal Court, and caused him to be taken before Justice, for hearing on the charge.

Guernsey, through his counsel, at this point protested that he was thereunder jurisdiction of the Federal Court, subject to its order and that the proceedings before the Justice were an interference with that jurisdiction and could not rightly be maintained.

The County Attorney opposed. The Justice ruled with him. Evidence was taken and the Justice held Guernsey to appear at the next term of the State Court, to remain there to answer the charge, depart without leave and abide by the judgment of the Court.

It is argued here as it was before the Justice of the Peace that the State could acquire and did complete jurisdiction over the person of Guernsey, to hold him, to incarcerate him if necessary for the purpose of the trial. Counsel seem to doubt that the State could have immediately executed a sentence of imprisonment, but why not if jurisdiction is by right.

14 In *Donle* v. *Kessenden*, 258 U.S. 254, 42 S. Ct. 309-310.

The custody was an executive officer, and it was held that he could release his control of a Federal prisoner while a State Court tried him on a State charge.

There can be no doubt Guernsey was under the jurisdiction of the Federal Court subject to its order under the probation statute, at any time, and where the Justice of the Peace issued his warrant for the arrest of Guernsey, and held him for trial on the State charge, and that he abide the judgement of the Court, there was a direct in-

terference with Federal jurisdiction and a violation of the Rule of Comity, between Federal and State Courts.

In *Taylor* v. *Tainter*, 16 Wall. 366, 370 21 Fed. 287, it is said—where a State Court and a Court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed, and this rule applies alike in both civil and criminal cases.

In the *Donzis, supra*, the Court said, it was there held that a statute gave to the Attorney General such control of the convict after he was imprisoned under the sentence as to authorize him to consent to the convict's trial in the State Court.

15 No statute is called to our notice and we know of none, that gives any officer the right here claimed by counsel representing the State.

No application was made to the United States District Judge and no authority cited, holding that he had the power and it was his duty to release control over Guernsey for prosecution in the State Court, with or without condition that he be released to the Federal Court after trial in State Court.

16 D

CONCLUSION

In this motion, the petitioner has advanced the logical theory that the Honorable Court did not have jurisdiction to prosecute and impose a sentence of two years upon the petitioner, while the petitioner was awaiting prosecution on a Federal charge. Therefore the petitioner prays that the sentence in this case be vacated, set aside and held for naught, as being unconstitutional, as the court had no jurisdiction of the subject matter or of the person of the petitioner.

WHEREFORE, your petitioner sincerely prays that this Honorable Court will enter an order to return him to the jurisdiction of this court for hearing of the above cause, and after hearing the arguments of both parties herein, will enter an order to vacate, set aside, and hold for naught, this sentence imposed.

Respectfully submitted,

ROY WEBBER TINDER, JR.,
P.M.B. 70573 Atlanta, Ga.
Petitioner.

17 STATE OF GEORGIA,
County of Fulton:

Sworn to before me on Dec. 6, 1950, by Roy Webber Tinder Jr. as being true and correct.

P. C. KINDEL,
Notary Public, Fulton County, Georgia.

My Commission expires 9-11-51.

18 [File endorsement omitted]

In United States District Court

[Title omitted]

ORDER DENYING MOTION TO VACATE, SET ASIDE AND CORRECT SENTENCE—Filed January 18, 1951

Upon consideration of the motion of the defendant "to vacate, set aside and correct sentence", it conclusively appears from the said motion that the defendant is entitled to no relief, first because the sentence of which he complains was not passed by this Court but was entered by the Corporation Court of the City of Norfolk, Virginia, and secondly, if it is intended to vacate, set aside or correct the sentence passed by this Court on September 13, 1950, the said motion and the record of the case fail to disclose any ground to sustain said motion, and, therefore, it is

ORDERED that the said motion be denied.

Let a copy of this order be mailed by the Clerk to the said defendant and to the United States Attorney for this district.

ALBERT V. BRYAN,
United States District Judge.

Norfolk, Virginia.
January 18, 1951.

19 [File endorsement omitted]

In United States District Court

[Title omitted]

ORDER ALLOWING DEFENDANT TO PROCEED IN FORMA PAUPERIS ETC.—Filed September 19, 1951

Upon consideration of the motion of the defendant to correct the sentence imposed upon him in this court on September 13, 1950, and of his motion to proceed therein without the prepayment of costs or security therefor, it is

ORDERED that the motion of the defendant to proceed in forma pauperis is hereby granted, and the said motion is now filed, and it is further

ORDERED that the United States of America show cause, if any it can, before this Court at ten o'clock A. M., September 26, 1951, at Norfolk, Virginia, why the said sentence should not be vacated and corrected, and the defendant discharged from custody thereunder, as prayed in said motion, and it is also

ORDERED that a copy of this order, together with a copy of the said

motion be forthwith served upon the United States Attorney for this district by the Marshal, and that a copy of this order be mailed by the Clerk to the said defendant, but it shall not be necessary to produce the defendant at the hearing of the said motion.

ALBERT V. BRYAN,
United States District Judge.

Alexandria, Virginia.
September 19, 1951.

21 In United States District Court

Aug. 1951

From Roy Webber Tinder, Jr.
P.M.B. 70573—Atlanta, Ga.
To Mr. Wallsley, E. Johnson, Clerk, U. S. District Court, Norfolk, Va.

Dear SIR:

Enclosed please find three (3) copies of Motion to Correct Illegal Sentences. Kindly present same to the Court forthwith and serve one copy on the United States Attorney.

The request for a speedy disposition is grounded upon the fact that should I be entitled to the relief prayed for, I shall have long past served my legal sentence.

Kindly acknowledge receipt of the Motion and letter personally to me.

Very truly yours,

ROY WEBBER TINDER, JR.,
P.M.B. 70573,
Atlanta, Georgia.

22 In United States District Court

[Title omitted]

AFFIDAVIT IN FORMA PAUPERIS

COUNTY OF FULTON,
State of Georgia, ss.

Comes now Roy Webber Tinder, Jr. the defendant in the above entitled cause and deposes and says that he is a citizen of the United States, that he verily believes his motion to correct illegal sentences is a meritorious cause of action and he is entitled to the redress he seeks thereby.

23 That he is a poor person unable to pay the clerk's fees for filing his motion nor the Court costs therein or give security for same; that his motion is made in good faith and is without levity.

Wherefore affiant-defendant pray he be granted leave to proceed upon his affidavit of poverty as made and provided by Section 1915 U.S.C. Title 28.

And he will ever pray.

ROY WEBBER TINDER, JR.,
Affiant-Defendant.

Subscribed and sworn to this 3rd day of August 1951.

This person known to me only by the records of the U. S. Penitentiary, Atlanta, Georgia.

MACON BARBEE,
[SEAL.] *Notary Public.*

Notary Public, Fulton County, Georgia. My Commission Expires Jun. 27, 1954.

24 In United States District Court

[Title omitted]

MOTION TO CORRECT ILLEGAL SENTENCES

Comes now Roy Webber Tinder, Jr., the defendant in the above entitled cause and prays this Honorable Court to correct the illegal sentences heretofore imposed upon him in this cause on September 13, 1950, and as grounds for his motion states:

One

The sentence imposed upon the defendant on Counts One to Six of the indictment are in excess of the maximum provided by Section 1708 U.S.C.A. Title 18.

25 Two

The indictment in Counts One to Six fails to charge the defendant did take from the letter box or mail receptacle of the named person a letter containing a check, article or thing, the face value of which was in an amount in excess of $100 or more.

Three

The substance of the accusation contained in an indictment returned by a Grand Jury. Pursuant to 1708 U.S.C.A. Title 18, requires as made and provided by the Statute the indictment allege the value of the contents contained in the stolen mail matter in order to ground the jurisdiction of the Court to impose a penalty within the Statutory limits.

Four

The prerequisite of Section 1708 U.S.C.A. Title 18 to grant the Court power and authority to impose a sentence in excess of one year and a fine of not more than $1000 or both is the value or face value of any checks, article or things contained in the stolen mail matter.

26

Five

The value or face value of the mail matter or the article or thing contained therein is an element of the offense and an indictment under Section 1708 U.S.C.A. Title 18 must contain the essential allegations of value to grant the Court jurisdiction to increase the provided statutory penalty.

Six

The pertinent part of Section 1708 involved in this cause provides in part.

". . . Shall be fined not more than $2000 or imprisoned not more than five years or both; but if the value or face value of any such article or thing does not exceed $100 he shall be fined not more than $1000 or imprisoned not more than one year or both.

Seven

The defendant on the 13th day of September 1950, entered his plea of guilty to the six counts of the indictment No. 10-206 and was sentenced by the Court to a term of imprisonment for a period three (3) years on each count of the indictment, said sentences to run concurrently. Wherefore the concurrent sentence of (3) years imposed upon the defendant is two (2) years in excess of the jurisdiction of the Court.

27

Eight

The defendant on July 12, 1951, with good time deductions as provided by Section 4161 U.S.C.A. Title 18, faithfully and fully completed the lawful and legal portion of sentence as constituted by law and is now being illegally restrained of his liberty.

Nine

Section 2255 U.S.C.A. Title 28 provides in part:

"A prisoner in custody under sentence of a Court of the United States claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States or the Court was without jurisdiction to impose

such sentence, or the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the Court which imposed the sentence to vacate, set aside or correct sentence."

"A motion for such relief may be made at any time . . ."

28 Wherefore defendant prays that a writ of Habeas Corpus adprosequendum issue to the United States Marshal for the Eastern District of Virginia, Norfolk Division, commanding him to transport the defendant from the United States Penitentiary, Atlanta, Georgia, to the Eastern District of Virginia and thereafter produce him before the bar of the Court on the day and date certain named in the writ and thereupon he be discharged by due process of law; or in lieu thereof;

The Court correct the illegal sentence in accordance with law and the corrected judgment and commitment issue to William H. Hiatt, Warden, United States Penitentiary, Atlanta, Georgia with direction to discharge the defendant, without delay.

And the Defendant will ever pray.

ROY WEBBER TINDER, JR.,
Defendant Prose.

29 COUNTY OF FULTON,
State of Georgia, ss.

AFFIDAVIT OF VERIFICATION

Personally appeared before me, a Notary Public one Roy Webber Tinder Jr. who after being duly sworn, on his oath deposes and says; That he has read the motion to correct illegal sentences and contents contained therein are true to the best of his information knowledge and belief. Further affiant sayeth not.

ROY WEBBER TINDER, JR.,
Affiant Defendant.

Subscribed and sworn to me this 3rd day of August 1951.

This person known to me only by the records of the U. S. Penitentiary, Atlanta, Georgia.

MACON BARBEE,
[SEAL.] *Notary Public.*

Notary Public, Fulton County, Georgia. My Commission Expires Jun. 27, 1954.

30 [File endorsement omitted]

In United States District Court

[Title omitted]

MEMORANDUM OPINION DENYING MOTION TO VACATE SENTENCE—Filed October 4, 1951

By motion to vacate his sentence the defendant poses the question whether theft of the mail is punishable by imprisonment for more than a year if the matter stolen does not have a value or face value in excess of $100.00.

On September 13, 1950 the defendant pleaded guilty to a six count indictment charging that in each instance he "did unlawfully and feloniously take from the letter box or mail receptacle" of a named addressee "a letter", contrary to the provisions of Title 18, sec. 1708, United States Code. The judgment and commitment records that the defendant was sentenced to imprisonment of "three (3) years on each count of the indictment, said sentences to run concurrently." The minutes of the Clerk are in accord. Unavoidably the stenographic transcript of the court reported is not available, but for the present ruling it is assumed that the formal judgment is conclusive of the terms of the sentence.

31 Inasmuch as the indictment lays no value, the letter in each count must be taken as not exceeding $100.00 in value. The defendant argues that when the stolen object does not have a value beyond $100.00, the statute limits the punishment to one year and a fine. As the sentence directs that the imprisonment on all the counts run concurrently, the total could, of course, be no more than the maximum punishment for one count. Therefore, he concludes, since he has now served the full authorized sentence, he should be leased.

Because *Armstrong* v. *U. S.*, 9 Cir., 187 F. 2d 954, supports the defendant, I set his motion for hearing on notice to the United States Attorney. Arguments by counsel produced no other precedent, and it is conceded that the Court of Appeals for the Fourth Circuit has not had the point before it. While the Ninth Circuit is not peremptory authority here, it is very persuasive, and it is with deference, therefore, that I do not follow the *Armstrong* case, but I cannot agree with its conclusion.

The revision embraced in 18 USC 1708 evinces no intention on the part of the Congress to overturn its long-standing declaration that thievery of the mails should in all circumstances be a felony. The present statute became effective September 1, 1948, save for a

[1] 28 USC 2255.

trivial amendment in 1949, and for many years prior all
32 tampering with the mails was subject to imprisonment up to 5 years plus a fine of $2,000.00. The revisers did not propose that the value provision inserted by them should qualify the penalty for every kind of mail theft. Five years and $2,000.00 is still made the maximum by the new statute. The value clause, me judice was directed exclusively to the single offense of removing "any article or thing" contained within a unit of mail.

For convenience of reference the new statute is quoted:

"Sec. 1708. Theft or receipt of stolen mail matter generally.

"Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled or abstracted—

33 "Shall be fined not more than $2,000, or imprisoned not more than five years, or both, but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Perusal of the act's defining paragraphs—the first three—reveals that the Congress used the phrase "article or thing" as descriptive of something in addition to a "letter, postal card, package, bag, or mail." "Article or thing" is further narrowed in th estatute as an object "contained" in a letter, package, or other enclosures commonly comprising mail. The Congress obviously intended to create a separate crime consisting alone of filching the contents of a letter, an offense not depending upon a taking of the letter. As the words "article or thing" are thus so clearly restricted in their meaning

when the crimes are defined, there is no warrant for ascribing a broader meaning to the phrase when it oppear idem verbis in the penalty paragraph—the last—of the same statute.

This is not a strained interpretation. On the contrary, to make the value glause apposite to every phase of mail plunder would deprive the mails of their customary protection. Thus, it is quite possible for a sack, or indeed even many sacks, of mail not to have a "value or face value" in excess of $100.00. For a certainty, the Congress did not conceive of so extensive an invasion of the mails as only a misdemeanor. Nor did it intend to encumber the criminal prosecution for a general pilfering of the mail with the
34 burden of proving value, face or intrinsic. Because the value clause does in actuality seem so utterly inapplicable to the theft of a "letter, postal card, package, bag, or mail", I am confident that the Congress applied the provision only to the "article or thing contained therein", and not to the mail generally.

The motion will be denied.

ALBERT V. BRYAN,
United States District Judge.

Alexandria, Virginia.

October 4th, 1951.

35 [File endorsement omitted]

In United States District Court

[Title omitted]

ORDER DENYING MOTION TO VACATE SENTENCE AND ALLOWING DEFENDANT TO PROCEED IN FORMA PAUPERIS—Filed October 4, 1951

Upon consideration of the motion of the defendant to vacate, set aside and correct the sentence imposed upon him in this Court on September 13, 1950, and of the motion of the defendant to proceed herein without the prepayment of fees and costs or security therefor, it is

ORDERED that the motion of the defendant to proceed herein in forma pauperis be, and it is hereby granted, and the said motion is filed, and the Court having caused notice of the said motion of the defendant to vacate, set aside and correct the said sentence to be served upon the United States Attorney, and having heard the arguments thereof of counsel for the defendant and of the United States Attorney, is now of the opinion, for the reasons set forth in its memorandum filed herein, that the said sentence was not in excess of the maximum authorized by law and is not otherwise subject to collateral attack, it is further

36 ORDERED that the said motion to vacate, set aside and correct the said sentence be, and it is hereby, denied.

Let a copy of this order and of the said memorandum be mailed by the Clerk to the United States Attorney and to W. H. Starkey, Esquire, attorney for the defendant.

ALBERT V. BRYAN
United States District Judge.

Alexandria, Virginia.
October 4th, 1951.

37 [File endorsement omitted]

In United States District Court

[Title omitted]

NOTICE OF APPEAL—Filed October 12, 1951

Notice of Appeal is hereby given this 11th day of October 1950 that the defendants Notice of Appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the judgment of the Court entered on the 4th day of October 1951 denying the motion to vacate judgement and sentence.

ROY WEBBER TINDER, JR.,
Defendant,
P.M.B. #70573 Atlanta, Georgia.

Form required by Title 28, U.S.C.A. Section 2255.
Dated: October 10th 1951.

38-39 In United States District Court

AFFIDAVIT

To whom it may concern:

I, Roy Webber Tinder Jr., in accordance with The Law prescribed in such cases under the Form of Pauperisa (Paupers Oath) Do Hereby Swear and admit to the above by reason and virtue of being a poor person, without funds, monies or mediums used as legal currency for purpose of exchange or purchase in the United States of America and by acceptance of this oath solemnly acknowledge my inability financially to pay for any and all the legal documents required by me in the immediate issue.

ROY WEBBER TINDER, JR.,
Appellant.

Subscribed and Sworn to before me this 10 day of Oct. 1951.

T. C. KINDEL,
[SEAL] *Notary Public.*

Notary Public, Fulton County, Georgia. My Commission Expires 9-11-55.

40 In United States District Court

[Title omitted]

DEFENDANTS DESIGNATION OF RECORD

Comes now Roy Webber Tinder, Jr., the defendant in the above entitled cause and designates the contents of the record to be contained on appeal and prays same to be prepared, certified and transmitted to the Clerk of the United States Court of Appeals for the Fourth Circuit, with reference to the Notice of Appeal filed by defendant in said cause and to include the following to wit:

1. Motion to Vacate Judgment and Sentence.
2. Indictments, judgments, and commitments, order denying motion.
3. Memorandum Opinion.
4. Notice of Appeal, Affidavits in forma pauperis.
5. Order allowing appeal, and this precipe.

Respectfully submitted,

ROY WEBBER TINDER, JR.,
Defendant.

Dated: October 10th 1951.

41 [File endorsement omitted]

In United States District Court

[Title omitted]

ORDER ALLOWING DEFENDANT TO PROSECUTE AN APPEAL—Oct. 16, 1951

Upon motion of the defendant, it is

Ordered that the defendant may prosecute an appeal from the order denying his motion to vacate his sentence, without prepayment of, or security for, such fees and costs as may be required by law to be paid in this court for said appeal.

Let a copy hereof be mailed by the Clerk to the United States Attorney and to W. H. Starkey, Esquire, counsel for the defendant.

ALBERT V. BRYAN,
United States District Judge.

Alexandria, Virginia.

October 16th, 1951.

42 Clerk's Certificate to foregoing transcript omitted in printing.

43 In the United States Court of Appeals for the Fourth Circuit

No. 6354

[Title omitted]

MINUTE ENTRIES

October 18, 1951, duplicate notice of appeal is filed and the cause docketed.

Note: The notice of appeal appears at page 32 of the record.

ORDER PERMITTING APPELLANT TO PROSECUTE APPEAL IN FORMA PAUPERIS, ETC.—Filed October 18, 1951

[Style of Court and Title Omitted]

Upon the affidavit and petition of the Appellant, and for good cause shown,

It is ordered that the Appellant be, and he is hereby, permitted to prosecute his appeal in this Court in the above entitled case in forma pauperis in accordance with Title 28 United States Code, Section 1915, without the prepayment of costs or the giving of security therefor, and to file six (6) typewritten copies of brief and appendix instead of the twenty-five (25) printed copies required by the rules, and to serve copy of said brief and appendix on opposing counsel.

October 15, 1951.

JOHN J. PARKER,
Chief Judge, Fourth District.

October 18, 1951, copy of designation of record filed.

October 18, 1951, copy of order of Judge Bryan allowing appellant to prosecute appeal with prepayment of, or security
44 for, fees and costs, filed.

October 24, 1951, brief of appellant is filed.

November 3, 1951, the record on appeal is filed.

November 6, 1951, the appearance of Golden N. Dagger and Justinus Gould is entered for the appellee.

November 10, 1951, brief and appendix for appellee are filed.

November 12, 1951, petition of appellant for a continuance of 10 days to traverse brief of appellee filed in open court. Continuance denied and appellant allowed to file a reply brief within 10 days.

ARGUMENT OF CAUSE

November 12, 1951, (November term, 1951) cause came on to be heard before Parker and Soper, Circuit Judges, and Chesnut, District Judge, and was taken on brief of appellant, and argued on behalf of the appellee, and submitted.

November 15, 1951, traverse of appellant is filed.

November 23, 1951, reply brief of appellant is filed.

45 In United States Court of Appeals for the Fourth Circuit

No. 6354

ROY WEBBER TINDER, JR., Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk

(Argued November 12, 1951. Decided December 28, 1951)

OPINION—Filed December 28, 1951

Before PARKER and SOPER, *Circuit Judges*, and CHESNUT, *District Judge*

Roy Webber Tinder, Jr., Pro Se, on brief, and Justinus Gould, Attorney, Department of Justice, (James M. McInerney, Assistant Attorney General; George R. Humrickhouse, United States Attorney, and Golden N. Dagger, Attorney, Department of Justice on brief) for Appellee.

46 CHESNUT, *District Judge:*

The appellant in this case, Roy Webber Tinder, Jr., was indicted in the Eastern District of Virginia July 10, 1950 in six counts for the theft of six separate letters from the box or mail receptacles of six different persons on six separate dates on and between March 1, 1950 and May 3, 1950. The indictment was based on 18 USCA, s. 1708. On September 13, 1950, represented by counsel, he pleaded guilty to the whole indictment and was sentenced by District Judge Ben Moore to imprisonment for "three years on each count of the indictment, said sentences to run concurrently, unless sooner released by operation of law". On or about August 3, 1951 the defendant filed a motion under 28 USCA, s. 2255 to vacate or correct the sentence. This motion was denied on October 4, 1951 by District

Judge Bryan who filed a memorandum opinion upholding the legality of the sentence, and an order overruling the motion, from which this appeal has been taken.

Appellant's contention then and now is that the sentence imposed upon him was illegal and excessive because the indictment did not allege in any of the six counts that the stolen letters were of a value more than $100 and therefore the maximum punishment under any count was not more than a fine of $1,000 and imprisonment of not more than one year, and that, as the sentences on all six counts were made to run concurrently, and as he has now been in prison for more than a year, he is entitled to be released from further imprisonment.

The question presented requires us to determine the proper construction and application of section 1708 and particularly the fourth paragraph thereof which imposes the punishment for violations. The whole of the statute reads as follows. (We have italicized the phrases in all four paragraphs which we think sharply present
47 the matter to be determined).

"1708. Theft or receipt of stolen mail matter generally

"*Whoever* steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or *abstracts or removes from any* such letter, package, bag, or *mail, any article or thing contained therein*, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, *or any article or thing contained therein;* or

"*Whoever* steals, takes, *or abstracts*, or by fraud or deception obtains any letter, postal card, package, bag, or mail, *or any article or thing contained therein* which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"*Whoever* buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, *or any article or thing contained therein*, which has been so stolen, taken embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted,—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both; but if the value or face value of *any such article or thing* does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both".

It will be noted that the precise question is whether the phrase "any article or thing" as used in the first, second and third para-

graphs and the phrase "any such article or thing" in the fourth paragraph properly includes letters which have been stolen from letter boxes or mail receptacles. Or, otherwise stated, is the theft
48 of letters from the mail still to be classed as a felony or only as a misdemeanor unless it is alleged and proved that the letter had a "value or face value" in excess of $100. Under the revised federal criminal code (18 USCA, 1948 Ed.) the distinction between felonies and misdemeanors is still dependent upon the amount of the maximum punishment authorized by the statute for each particular crime. If the maximum imprisonment exceeds a year the offense is a felony; if not, a misdemeanor (18 USCA, s. 1). It is the contention of the appellant that by the fourth paragraph of section 1708 the grade of the offense of theft of letters from the mail has been reduced to a misdemeanor in every case unless it is alleged and proved that the value of the letters stolen was more than $100. The Government denies the correctness of this contention and after careful consideration of the question we have concluded that the Government's contention is correct and that of the appellant is unsound.

The appellant's precisely stated contention is that the phrase "any such article or thing" in the fourth paragraph of section 1708 includes the word "letter" contained in the first paragraph and necessarily also in the second and third paragraphs. We do not think this was the intention of Congress in enacting the wording of the section, by the revision of 1948. The history of the statute is both pertinent and persuasive, but before adverting to it, we will first consider the wording of the section as presently expressed. An analysis of the first three paragraphs of the section will show that the wording consists principally of (1) acts prohibited and (2) subjects affected thereby. It will be noted that the acts are differently stated in each of the first three paragraphs and include (a) steal, take or abstract, (b) abstract or remove from letters, packages, box or mail, (c) secrete, embezzle or destroy and (d) buy, receive, conceal or
49 unlawfully have in possession. But the subjects of the prohibited acts are uniformly described in each of the three paragraphs as a letter, postal card, package, bag or mail, or *any article or thing contained therein*. The fourth paragraph specifies the penalty for any violation of any of the first three paragraphs with the proviso "but if the value or face value of any *such* article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both". As a mere grammatical matter it is apparent that the article or thing so referred to in the proviso is that article or thing which is referred to in the first three paragraphs; and it will be noted that such article or thing has been described as "any article or thing" *contained* in a letter, etc. There is thus grammatically a clear distinction made by the statute between a letter and the removal of an article or thing from the

letter. A letter is, of course, a medium for communicating ideas or thoughts and is in itself intrinsically not a thing of a tangible nature; while the ordinary conception of an article or thing is of something that is tangible and susceptible of valuation.

Again, the proviso in the fourth paragraph is coupled with the condition that the article or thing has a value or face value not exceeding $100. The word "value" obviously refers to market, actual or computable value of a tangible thing, and the words "face value" were doubtless inserted to comprehend securities such as promissory notes, bonds or other documents which on their face purport to carry obligations of a stated monetary amount. We think, therefore, that grammatically considered the section makes a clear distinction between letters and articles or things which have been contained in letters and have been removed therefrom with or without the theft or destruction of the letter as the container. And it will have been noted that in the proviso of the 4th paragraph as to the
50 limited maximum punishment the description of the article or thing is "any *such* article or thing". The reference here is to the same article or thing which has been described in the first, second and third paragraphs and we think clearly means a tangible thing in contrast with a letter which intrinsically has no assignable value or face value.

This construction of the language of section 1708 as it now exists is fortified by the history of the statute. The earliest statute which we have noted providing penalties for theft or robbery of the mail is section 19 of chapter 37 of the Acts of 1810 (2 Stat. 598). It prohibited and punished theft or pilfering or tampering with the mail in much the same language found in the present section 1708; and distinguished between the theft of letters containing "any article of value, or evidence of any debt, due, demand, right or claim, or any release, receipt, acquittance or discharge" and letters "not containing any article of value or evidence thereof". The maximum punishment for the former offense was 7 years and for the latter a fine of $500. The next Act upon the subject, section 22 of chapter 64 of the Acts of 1825, (4 Stat. 109), is in very similar language but it increased the penalty for theft of letters containing "any article of value" to not less than 2 nor exceeding 10 years, and also increased the penalty for taking a letter not containing an article of value to a fine not exceeding $500 and imprisonment not exceeding 12 months. The next Act is section 281 of chapter 335 of the Acts of 1872 (17 Stat. 318) which made a distinction between the theft of a letter itself and the theft or opening or destroying of a letter containing notes, bonds, drafts, checks and similar writings or pecuniary obligations or securities, and made the penalty for both on conviction imprisonment at hard labor for not less than one nor more than 5 years.
51 Without much significant change in phraseology the statute was reenacted from time to time as it appears in the Revised

Statutes (Rev. Stat. 5469) and in chapter 321, sec. 194 of the Acts of 1909 (35 Stat. 1125) until it became section 317 of title 18, 1940 edition, by the phraseology of which distinction is again made between the theft of a letter and of "any article or thing contained therein". And without distinction as to amount or value the maximum penalty was a fine of not more than $2,000 or imprisonment of not more than 5 years or both. Section 317 of title 18, 1940 edition, was by the revision of 1948 carried into section 1708 with commendable condensation and simplification of phraseology but apparently without intended substantial change in effect, except for the addition of the proviso in paragraph 4 of the section which reduces the maximum penalty in case the article or thing taken does not exceed $100 in value.

In the Reviser's notes to section 1708 (see 18 USC, Cong. Serv. p. 2576) it is said (referring to the proviso in the 4th paragraph) as follows:

> "The smaller penalty for an offense involving $100 or less was added (see ss. 641 and 645 of this title)".

Section 641 punishes the theft or embezzlement of public money, property or records and provides therefor as a maximum penalty a fine of not more than $10,000 or imprisonment of not more than 10 years, or both, but with the proviso reading:

> "But if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both".

Section 645 punishes embezzlement by court officers of money coming into their hands officially and makes the penalty a fine and
52 imprisonment of not more than 10 years, or both; but again with the proviso reading:

> "but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both".

Again sections 646-654; 656-659 and 662 contain similar provisos limiting the maximum punishment in cases of pecuniary value to a fine of not more than $1,000 or imprisonment for not more than one year, or both. See also the statement of William W. Barron, Chief Reviser, with respect to changes in punishment made in the revision of 1948, found in 18 USC, Cong. Serv. p. 2667.

From this historical review of the statute it appears that at least since 1872 a theft of letters from the mail has been regarded as a felony because punishable by a maximum sentence of 5 years; and it also appears that from even earlier statutes down to and including

the present time a distinction has been made with respect to the theft of letters intrinsically considered as such, and the theft of articles or a thing of value contained in such a letter in the mail. We also find from the Reviser's notes with respect to the presently worded section 1708 that the proviso in the fourth paragraph limiting the maximum imprisonment to not more than a year was not adopted for any particular or specific reason applicable to section 1708 but in pursuance of a general plan by the Revisers to make uniform and more modern the punishment for theft, embezzlement or wrongful conversion of money or things of pecuniary value of not more than $100. We think it logically follows from this that it was not the intention of Congress to change the classification of theft of letters from the mail from that of a felony, which it had been for many years and through many revisions and reenactments of the statute, into a mere misdemeanor. If the appellant's contention
53 is correct it would practically be impossible to treat the theft of a letter however weighty and important to the sender or receiver as a felony because it would be seemingly impossible to allege and prove that the letter had a value of more than $100. It can hardly be said that a letter, apart from money, checks or other things of value contained therein and separately considered, has any assignable "value or face value". But on the other hand a moment's reflection will bring to mind the vast and sometimes almost incalculable importance of the ideas, messages and mental expressions contained in some letters, as, for instance, correspondence of governmental officials in the diplomatic, military or judicial service of the country or business correspondence which by letters create contracts of great importance to the users of the mail, or indeed personal or family letters containing information or messages of joy or grief or otherwise affecting domestic relations. Therefore, while it would be impossible to assign pecuniary value to such letters intrinsically considered, their importance to the sender or receiver may be of much significance, and the unlawful theft of them from the mails might entail very large consequential damages. In view of the great importance of the safe carriage and delivery of the mail in our economic and social life, it seems to us almost inconceivable that it was the intention of Congress in the last revision of section 1708 to reduce the crime of unlawful theft of letters from the mail from the grade of a felony to that of a misdemeanor.

The appellant's principal reliance is placed on the decision of the 9th Circuit in the case of *Armstrong* v. *United States*, 187 F. 2d. 954, which, it must be conceded, does clearly support the contention. We have carefully considered the opinion of that eminent court but find that we are not able to agree with the result reached for
54 the reasons heretofore given.

We are not unmindful of the rule that criminal statutes

must be strictly construed where uncertain or ambiguous, but this does not require that the statute be given the narrowest possible meaning or that the Congressional evident intent should be disregarded. *United States* v. *Giles*, 300 U. S. 41, 48; *Singer* v. *United States*, 323 U. S. 338, 342; *Haggar* v. *Helvering*, 308 U. S. 389, 394; *United States* v. *Raynor*, 302 U. S. 540, 552.

For these reasons we conclude that the order appealed from must be

Affirmed.

55 In United States Court of Appeals for the Fourth Circuit

No. 6354

ROY WEBBER TINDER, JR., APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia

JUDGMENT—Filed and Entered December 28, 1951

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.
MORRIS A. SOPER,
U. S. Circuit Judge.
W. CALVIN CHESNUT,
U. S. District Judge.

ORDER STAYING MANDATE (omitted in printing)

56 ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPT OF RECORD IN MAKING UP RECORD FOR SUPREME COURT (omitted in printing)

57 Clerk's certificate to foregoing transcript omitted in printing.

58 Supreme Court of the United States, October Term, 1951

No. 305, Misc.

[Title omitted]

ORDER ALLOWING CERTIORARI—June 9, 1952

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 113, October Term, 1952, and placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1953 242826

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 113

ROY WEBBER TINDER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER ROY WEBBER TINDER, JR.

WILLIAM W. KOONTZ,
Alexandria, Virginia,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 113

ROY WEBBER TINDER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER ROY WEBBER TINDER, JR.

Opinions Below

The opinion of the Court of Appeals (R. 20-26) is reported at 193 F. 2d 720. The memorandum opinion of the District Court (R. 14-16) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 28, 1951 (R. 26). The petition for writ of certiorari was filed January 16, 1952, and granted June 9, 1952. The jurisdiction of this Court rests upon 28 U. S. C. §1254 (1).

Question Presented

Whether, under 18 U. S. C. §1708, the penalty for theft of the mail can be imprisonment for longer than a year if the matter stolen does not have a value or face value in excess of $100.00.

Statute Involved

18 U. S. C. § 1708

"§ 1708. THEFT OR RECEIPT OF STOLEN MAIL MATTER GENERALLY.

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both; but if the value or face value

of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 779, amended May 24, 1949, c. 139, § 39, 63 Stat. 95.'"[1]

Statement

Petitioner, Roy Webber Tinder, Jr., represented by counsel, pleaded guilty in the United States District Court for the Eastern District of Virginia on September 13, 1950, to a whole indictment consisting of six counts, each of which charged a separate violation of 18 U. S. C. §1708 (R. 3). The offenses charged were six thefts of letters from the mail boxes of six different addresses during the period of March 1, 1950, to May 3, 1950 (R. 1-2).

No count of the indictment alleges, and it does not appear elsewhere in the record, that the value of any letter exceeded $100.00. The trial court sentenced petitioner to serve three years on each count, the sentences to run concurrently (R. 3-4).

After he had served approximately one year of his sentence petitioner in August, 1951, filed a motion in the United States District Court for the Eastern District of Virginia under 28 U. S. C., § 2255 to vacate or correct his sentence (R. 11-13). The ground for this motion was that since none of the matter stolen from the mail boxes was of a value of more than $100.00, the maximum imprisonment which could

[1] Following the decision of the Ninth Circuit in *Armstrong* v. *United States*, 187 F. 2d 954, (printed as the Appendix to this brief at pp. 13-16) Congress at the urging of the Postmaster General and the Attorney General deleted the mis-demeanor clause of this statute. P. L. 432, 82d Cong., 2d Sess., approved July 1, 1952, provided: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the fourth paragraph of section 1708, title 18, United States Code, is hereby amended by changing the semicolon to a period and by striking out the clause reading 'but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.'" 66 Stat. 314.

have been imposed was one year on each count; and since the imprisonment on all counts was to run concurrently, the maximum total time for which he could be imprisoned was one year. The District Court denied petitioner's motion in a memorandum opinion on October 4, 1951 (R. 14-16), and the Court of Appeals for the Fourth Circuit affirmed this action on December 28, 1951, in an opinion written by Judge Chesnut (R. 20-26). Because of a conflict between this opinion and that of the Ninth Circuit in *Armstrong* v. *United States*, 187 F. 2d 954, this Court granted a writ of certiorari (R. 27).

Specification of Error to Be Urged

The Court of Appeals erred in holding that the statute did not contemplate a division of the crime of theft of mail into felonies and misdemeanors depending upon the value of the object stolen.

Summary of Argument

18 U. S. C. § 1708 does not distinguish between the crime of theft of the mail and the crime of theft of an article or thing from a piece of mail, and the punishment imposed for both crimes depends solely on the value of the matter stolen.

Argument

It is a cardinal principle of judicial interpretation that penal statutes are to be strictly construed, and that penalties are not to be extended or increased by implication. Doubt and ambiguity are to be resolved in favor of the accused. *United States* v. *Resnick*, 299 U. S. 207, 57 Sup. Ct. 126, 81 L. Ed. 127; *Pierce* v. *United States*, 314 U. S. 306, 62 Sup. Ct. 237, 86 L. Ed. 226; *United States* v. *Cardiff*, — U. S. —, 97 L. Ed. Adv. Ops. 132.

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction

itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." Chief Justice Marshall in *The United States* v. *Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37.

And in the words of the present Court as expressed by Mr. Justice Frankfurter in *United States* v. *Universal C. I. T. Credit Corp.*, — U. S. —, 97 L. Ed. Adv. Ops. 186, 189:

"Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

The statute under consideration very clearly provides that whoever steals from any mail receptacle any letter, postal card, package, bag or mail, or removes from any such letter, package, bag, or mail, any article or thing contained therein shall be fined not more than $2000 or imprisoned not more than five years, or both: "but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1000 or imprisoned not more than one year, or both." In other words if the stolen letter or package does not contain matter of a value in excess of $100 the wrongdoer cannot be punished by imprisonment of more than one year. The statute first makes it an offense to steal from the mail, and then fixes the punishment for the offense upon the value of the item stolen. This is the manifest intent of the statute and effect should be given to the plain meaning of its words. *Browder* v. *United States*, 312 U. S.

335, 61 Sup. Ct. 599; 85 L. Ed. 862; *United States* v. *American Trucking Association*, 310 U. S. 534, 60 Sup. Ct. 1059; 84 L. Ed. 1345.

The Court of Appeals, however, spelled out a subtle and technical distinction between stealing a piece of mail, namely a letter, postal card, package, bag, and stealing from such piece of mail any article or thing. In its opinion the greater penalty is imposed for stealing an item of mail, and the lesser penalty is invoked only when something tangible is unlawfully removed from the item of mail without the theft or destruction of the item itself.

Such a construction is strained and synthetic. According to it, to steal from the mail a letter consisting of an envelope and the writing contained therein is a far greater offense than to remove the contents of an envelope and leave the empty envelope in the mail.

There is nothing to suggest that by enacting this section as part of the revised Criminal Code in 1948 Congress intended that the penalty be determined by the type of offense rather than the value of the purloined mail. The proviso under consideration, "but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1000 or imprisoned not more than one year, or both" was added by the reviser of the Criminal Code of 1948, whose comment was: "The smaller penalty for an offense involving $100 or less was added. (See sections 641 and 645 of this title)". As the Court of Appeals for the Ninth Circuit very aptly pointed out in *Armstrong* v. *United States*: "This notation, which accompanied the proposed revision submitted to Congress for approval, does not suggest that the penalty was to be reduced only for certain types of offenses. The general language of the notation, together with the reference to a comparably ambiguous provision of Sec. 641, indicates application of the proviso to all prohibitory sections of the statute.". 187 F. 2d at 956.

Sec. 641 of the Criminal Code provides that whoever steals or embezzles "any record, voucher, money, or thing of value of the United States . . . or any property made or being made under contract for the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both, but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1000 or imprisoned not more than one year, or both." This section is worded very similarly to Sec. 1708 except that the word "property" is used rather than "article or thing." As to this section the reviser says:

> "The provisions for fine of not more than $1,000 or imprisonment of not more than 1 year for an offense involving $100 or less and for fine of not more than $10,000 or imprisonment of not more than 10 years, or both, for an offense involving a greater amount were written into this section as more in conformity with the later congressional policy expressed in sections 82 and 87 of Title 18, U. S. C., 1940 ed., than the nongraduated penalties of sections 100 and 101 of said Title 18."

Likewise Sec. 645, which establishes the punishment for embezzlement by court officials, contains a similar proviso: "but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." And here again the reviser says: "The smaller punishment for an offense involving $100 or less was inserted to conform to section 641 of this title which represents a later expression of congressional intent."

It is obvious that all these statutes were designed to fix a uniform standard for a division of the crimes into misdemeanors or felonies. 18 U. S. C. §1. The punishment is scaled according to the pecuniary amount or value involved in the particular offense. The statutes evince no intention to classify the punishment of the enumerated crimes on any other basis than value.

Such a classification for the purpose of punishment is in accord with the declared policy of the reviser, which was approved and adopted by Congress:

"CHANGES IN PUNISHMENT"

"Many inconsistencies in punishments were discovered. Some appeared too lenient and others too harsh when compared with crimes of similar gravity. The problem was twofold.

"First, it was found that in spite of an exact definition of felonies and misdemeanors, 29 punishments were inaccurately labeled, resulting in conflicting court opinions. This problem was solved by omitting from each of the 29 punishments any description of the offense as a felony or misdemeanor, leaving the test as to the kind of crime, to the definitive section.

"Second, serious disparities in punishments were discovered when the nature of various crimes was considered. Before attempting to eliminate these differences a master table showing the nature of each offense and its punishment was prepared. In this way many inequalities were eliminated and uniformity brought out of the conflicts which time had developed." HR Rep. No. 304, 80th Cong., 1st Sess.: 18 U. S. C. A. App. 588.

To the same effect is the statement of William W. Barron, Chief Reviser. 18 U. S. C. A. App. 597.

The statute under consideration at no place says or implies that theft of something from a piece of mail is a less serious offense than theft of the piece of mail.

"It would have been a simple matter for the reviser, or Congress, to have made clear, had such been the intent, that stealing 'an article or thing' from an item of mail, leaving the item of mail otherwise intact, is to be regarded as a less serious offense than stealing the item of mail itself. A highly technical distinction of this sort, which could easily have been spelled out, cannot be imposed on the general words 'any such

> article or thing' in the concluding proviso of Sec. 1708. Those words must be deemed to include any article or thing previously mentioned in Sec. 1708, whether it is described specifically as a 'letter' or generally as 'an article or thing.'" *Armstrong* v. *United States*, 187 F. 2d 954, 956.

Congress drew no fine distinction between these two types of theft, and such an artificial distinction should not be attempted by the courts. "It is safer to adopt what the legislature have actually said than to suppose what they meant to say." *Jones* v. *Smart*, 1 T. R. 51, quoted in *United States* v. *Chase*, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117.

When it learned that the sanctity and integrity of the mail might be impaired by Sec. 1708, Congress acted promptly to protect the mail, and it did not follow the strained technicalities spelled out by the Court of Appeals. It simply deleted from the section the proviso as to the value of the matter stolen and made all thefts of the mail or from the mail and receipt of stolen mail punishable by a fine of not more than $2,000 or imprisonment of not more than five years, or both. Amendment to 18 U.S.C. § 1708 of July 1, 1952; 66 Stat. 314. Every type of mail theft was thereby considered to be a felony regardless of the amount involved. There was no suggestion whatever on the part of Congress that stealing the contents of a piece of mail was a less serious offense than stealing the piece of mail itself.

Recently the Court has redeclared that "we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that expresses the purpose of Congress. Very early Chief Justice Marshall told us, 'Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived . . . *United States* v. *Fisher* (U. S.) 2 Cranch 358, 386, 2 L. Ed. 304, 314.'" *United States* 5,

Universal C. I. T. Credit Corp., — U. S. — 97 L. Ed. Adv. 186, 189.

Certainly the reports of the Congressional committees as to why in 1952 it was considered necessary to delete the proviso of Sec. 1708 very adequately explain what Congress had in mind when it originally added this proviso to Sec. 1708 in the Criminal Code of 1948. Sen. Rep. No. 980 and H. R. Rep. No. 1674, 82d Cong., 2d Sess., deal with the proposed amendment to 18 U. S. C. §1708. The Senate Report, repeated in substance by the House report, states in part as follows:

"PURPOSE"

"The purpose of this bill, which relates to the penalty for the theft and receipt of mail matter, is to make all such thefts felonies, regardless of the monetary value of the thing stolen. Under the Federal Criminal Code, any crime which carries a penalty of more than 1 year imprisonment, or a fine of more than $1,000 is considered a felony, while any crime carrying a fine or imprisonment smaller than this is considered a misdemeanor."

"STATEMENT"

"The present bill amends the penalty provisions of the fourth paragraph of section 1708, title 18, United States Code, by striking therefrom the italicized words:

"'Shall be fined not more than $2,000 or imprisoned not more than five years, or both; *but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.*'

"The effect of the present law is to make the crime of stealing mail a misdemeanor (fine of not to exceed $1,000 and imprisonment of not to exceed 1 year) if the value of the mail stolen does not exceed $100, and to make it a felony (fine up to $2,000 and imprisonment up to 5 years) if the value of the stolen mail exceeds $100. The effect of striking the italicized language will

be to make the crime a felony (with a uniform permissible penalty of up to $2,000 fine and up to 5 years' imprisonment) regardless of the value of the mail stolen.

"The language proposed to be stricken out was new matter added during the course of the revision and codification of title 18 of the United States Code in 1948. The historical and revision notes at the end of section 1708 of the code annotated for citations reveal that this language was added for the sake of uniformity. Certain other sections of title 18, in such crimes as theft and embezzlement divide the penalty into felonies and misdemeanors, depending upon the 'value' of the thing stolen, and the thought was that the same distinction should be made in the case of stolen mail. The committee now thinks that this was an incorrect view. While there may be valid reason for dividing the penalty in other types of crime, the thing being protected here is more the sanctity and integrity of the United States mails than it is the property value of individual pieces of mail, and this sanctity and integrity is of such importance that all violations warrant the heavier penalty."

Both the House and Senate passed the amendment without debate and it became P. L. 432, 82d Cong., 2d Sess.; 66 Stat. 314. We thus have a plain and clear statement of the intent of Congress at the time it enacted Sec. 1708 of the Criminal Code of 1948. The purpose was to put the crime of stealing mail in the same category as embezzlement and other thefts so that the penalty would depend upon the value of the matter stolen. There is nothing to indicate that Congress intended to draw the highly technical distinction between stealing an item of mail and stealing the contents of the item of mail.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with directions to modify the sentence by substituting not over one year in the place of three years on each count.

Respectfully submitted,

WILLIAM W. KOONTZ,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 12739

ARMSTRONG

v.

UNITED STATES

March 23, 1951

As Amended April 26, 1951

Cecil Armstrong, in propria persona, for appellant.

Frank J. Hennessy, U. S. Atty., R. H. Colvin and Macklin Fleming, Asst. U. S. Attys., all of San Francisco, Cal., for appellee.

Before Denman, Chief Judge, and Orr and Hastie, Circuit Judges

ORR, *Circuit Judge:*

In the year 1949 appellant entered a plea of guilty to four counts of an indictment. Each count charged that appellant "did steal, take and abstract from and ouf of an authorized depository for mail matter, to-wit, (a certain) house letter box * * * a (certain) letter * * *." The charges were brought under Sec. 1708, 18 U. S. C. A.

The trial court sentenced appellant to serve five years on the first count and three years on the remaining three counts. The three year terms were to run concurrently and to commence at the expiration of the five year term.

On September 26, 1950 appellant petitioned the trial court to correct the sentences on the ground that the penalty imposed was in excess of that provided by law. The petition was denied. The specific contention of appellant is: That the indictment does not allege, nor does it otherwise appear, that any of the letters alleged to have been taken from the letter boxes was of a value of more than $100, hence, the

maximum penalty which could have been lawfully imposed under each count was not more than a fine of $1,000 or imprisonment for not more than one year or both. Sec. 1708, 18 U. S. C. A., under which the indictment was drawn, reads:

"§ 1708. Theft or receipt of stolen mail matter generally.

"Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both, but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

It is the contention of the Government that the application of the lesser punishment provided by Sec. 1708 is limited to theft *from* the mail as distinguished from theft *of* the mail, and that the phrase "article or thing", as used in the proviso contained in Sec. 1708, has no application to mail, letters, etc., named in said section. Which is to say that only in the event possession of mail matter is obtained in a manner otherwise than that prohibited by Sec. 1708,

and the contents of such mail unlawfully then removed, can the lesser penalty be imposed.

Prior to the 1948 revision of the Criminal Code, the maximum penalty for violation of any provisions of the then controlling Sec. 317 was five years. In commenting on the proviso added to Sec. 1708 in 1948, the reviser said: "The smaller penalty for an offense involving $100 or less was added." (See sections 641 and 645 of this title.)" This notation, which accompanied the proposed revision submitted to Congress for approval, does not suggest that the penalty was to be reduced only for certain types of offenses. The general language of the notation, together with the reference to a comparably ambiguous provision of Sec. 641, indicates application of the proviso to all prohibitory sections of the statute. The distinction sought to be drawn by the Government is not supported by the statutory language. It would have been a simple matter for the reviser, or Congress, to have made clear, had such been the intent, that stealing "an article or thing" from an item of mail, leaving the item of mail otherwise intact, is to be regarded as a less serious offense than stealing the item of mail itself. A highly technical distinction of this sort, which could easily have been spelled out, cannot be imposed on the general words "any such article or thing" in the concluding proviso of Sec. 1708. Those words must be deemed to include any article or thing previously mentioned in Sec. 1708, whether it is described specifically as a "letter" or generally as "an article or thing."

Argument is made that federal statutes for generations have made theft of mail a serious felony and that the Government's preservation of the integrity of mail has been a cornerstone in the development of our national system of communication and because of the seriousness with which Congress has viewed mail theft and tampering in the past it is hardly reasonable to say that it intended to alter that attitude in the enactment of Sec. 1708. Such an argument, we think, loses its force in the face of an expressed intention to make a change by dividing the crime into felonies and misdemeanors with value as the determining factor.

We note the Government's argument that in a great majority of cases of mail theft it would be impossible to

allege or prove the value of a particular letter or other item stolen and thus result in misdemeanor prosecutions rather than felonies. This is a matter for the attention of Congress rather than the courts.

The order denying appellant's petition for correction of sentence is reversed and the cause remanded to the District Court with directions to modify the sentence heretofore imposed on defendant by substituting not over one year in the place of five years on the first count, and not over one year in the place of three years on each of the remaining counts.

(6986)

No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1952

ROY WEBBER TINDER, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM SUGGESTING THAT THE WRIT OF CERTIORARI BE DISMISSED

In the Supreme Court of the United States

OCTOBER TERM, 1952

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UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM SUGGESTING THAT THE WRIT OF CERTIORARI BE DISMISSED

This case involves a conflict between the decision below (193 F. 2d 720) and the earlier decision of the Ninth Circuit in *Armstrong* v. *United States*, 187 F. 2d 954, which the court below declined to follow (193 F. 2d at 724), as to the proper construction of the misdemeanor provision contained in the fourth paragraph of Section 1708 of the

1948 revision of the criminal code (18 U.S.C. [1946 ed.], Supp. V, 1708).[1]

The indictment in each of these cases charged simply that the defendant stole letters from authorized depositories for mail matter. Each defendant pleaded guilty, was sentenced to imprisonment for more than one year,[2] and thereafter, by

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[1] "Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter of mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled or abstracted—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both; but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[2] The Bureau of Prisons advises that, based upon the present computation of petitioner's good time allowances, he will be eligible for conditional release from his three year sentence on January 3, 1953.

motion in the sentencing court, challenged the sentence as excessive on the ground that since the indictment did not allege that the stolen letters were of a value of more than $100, the maximum imprisonment which could lawfully have been imposed was one year. In the *Armstrong* case, the Ninth Circuit agreed with this contention, holding that the misdemeanor provision of the fourth paragraph of Section 1708 applied to all the offenses defined in the section. In the instant case, on the other hand, the Fourth Circuit sustained the Government's contention that this provision applied only to removing an "article or thing" of value from a unit of mail, and not to theft of a whole unit of mail, such as a letter.

As noted by both Courts of Appeals, this controversy stems from the 1948 revision of the mail theft statute. Prior to the revision, the applicable provision, Section 194 of the Criminal Code of 1909 (18 U.S.C. [1946 ed.] 317), made no distinction in the penalties provided for the offenses defined therein; all were punishable by a fine of not more than $2,000 or imprisonment for not more than five years, or both. The reviser's only explanation (see 18 U.S.C. [1946 ed.], Supp. V, p. 959) of the addition of the misdemeanor provision in Section 1708 was a reference to Sections 641 and 645 of Title 18, which punish, respectively, theft and embezzlement of property of the United States and embezzlement by court officers, and

which contain similar provisions limiting the punishment to a fine of $1,000 and/or imprisonment for not more than one year where the value of the property taken does not exceed $100.

Following the *Armstrong* decision of the Ninth Circuit, the Postmaster General, later joined by the Attorney General, protested to Congress that the effect of the decision was to divide "the crime of theft of mail into felonies and misdemeanors, with the value of the matter stolen as the determining factor." It was pointed out that this was an artificial distinction having no relation to the intent of the thief, that in a great many cases it is impossible to place a pecuniary value on stolen mail matter, that the offense against the mails is the same regardless of the value or lack of value of the stolen item, and that "Historically, the sanctity and integrity of the mails has been a matter which the Congress and this [Post Office] Department have regarded as being of the utmost importance." It was proposed, therefore, that Section 1708 be amended by eliminating the misdemeanor provision. (S. Rep. No. 980, 82d Cong., 1st sess., pp. 3-4; H. Rep. No. 1674, 82d Cong., 2d sess., pp. 3-5.)

When our memorandum in reply to the petition for a writ of certiorari was filed on March 28, 1952, the Court was advised that a bill to that end (S. 2198) had passed the Senate on October 19, 1951 (97 Cong. Rec. 13542), and that on March 20, 1952,

the Judiciary Committee of the House had ordered the bill to be reported favorably.[3] The bill was not enacted, however, before the adjournment of the Court's 1951 term, and on June 9, 1952, the writ was granted. Thereafter, the bill passed the House and was approved on July 1, 1952.[4]

With the elimination of the misdemeanor provision of Section 1708, Congress has put to rest the question of interpretation underlying the conflict of decisions which, we assume, led the Court to grant certiorari in this case. Now, as before the 1948 revision (see p. 3, *supra*), all the offenses defined in the section are felonies, punishable by a maximum fine of $2,000 and/or imprisonment for not more than five years. This change in the statute does not, of course, effect prior violations, such as petitioner's, but it does make the issue of no future importance. As to the effect upon petitioner's sentence, see note 2, *supra*, p. 2.

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[3] Thereafter, on March 31, the House Committee submitted such a report (H. Rep. No. 1674, *supra*).

[4] P. L. 432, 82d Cong., 2d sess. (66 Stat. 314): "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the fourth paragraph of section 1708, title 18, United States Code, is hereby amended by changing the semicolon to a period and by striking out the clause reading 'but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.'"

In view of this development since the writ was granted, we suggest that the Court may deem it appropriate to dismiss the writ.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1952.

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No. 113

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 20-26) is reported at 193 F. 2d 720. The memorandum opinion of the District Court (R. 14-16) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1951 (R. 26). The petition

for a writ of certiorari was filed on January 17, 1952, and was granted on June 9, 1952 (R. 27). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under 18 U.S.C. [1948 rev.] 1708, the theft of a letter from the mails was a felony, carrying a five-year penalty, or a misdemeanor for which the penalty was one year.

STATUTE INVOLVED

At the time the offense involved in this case was committed, 18 U.S.C. [1948 rev.] 1708 provided:

> Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or
>
> Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for

collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both; but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.[1]

STATEMENT

On September 13, 1950, petitioner was convicted, on his plea of guilty pursuant to advice of his counsel, of six offenses in violation of 18 U.S.C. 1708 (R. 1-3). Each count of the indictment charged him with stealing a letter from the mail box of the addressee. The indictment did not contain any allegations with respect to the value of the stolen letters (R. 1-2). Petitioner was sentenced to three years' imprisonment on each count, the sentences to run concurrently (R. 3-4).

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[1] On July 1, 1952, this paragraph of the section was amended by deleting the misdemeanor provision. P.L. 432, 82d Cong., 2d sess., 66 Stat. 314.

After having served almost a year of his term, on August 3, 1951, petitioner filed a motion under 28 U.S.C. 2255 to correct the sentences, contending that the indictment charged misdemeanors under Section 1708, the maximum penalty for which was one year, instead of felonies for which the maximum penalty was five years (R. 11-13). The motion was denied (R. 14-17) and the Court of Appeals affirmed that order (R. 20-26).[2] Both courts below held that the misdemeanor provision of Section 1708 applied only to offenses involving an "article or thing" which had been abstracted or removed from a letter or package, not to offenses involving an intact unit of mail.[3]

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[2] The decision below is in conflict with *Armstrong* v. *United States*, 187 F. 2d 954 (C.A. 9), where it was held that the misdemeanor provision applied to all offenses defined by the section which involved mail matter of the value of $100 or less.

[3] On December 3, 1952, petitioner completed serving his term less good-time deductions and was released on parole. On March 16, 1953, his maximum sentence, as reduced 180 days by operation of 18 U.S.C. 4164, expired, and he was released from parole.

Since petitioner is no longer in either actual or technical custody, the action, viewed as one under 28 U.S.C. 2255, is moot. *United States* v. *Bradford*, 194 F. 2d 197, 200 (C.A. 2), certiorari denied, 343 U.S. 979; *Morgan* v. *United States* (C.A. 2), decided February 6, 1953; *United States* v. *Lavelle*, 194 F. 2d 202 (C.A. 2); *Crow* v. *United States*, 186 F. 2d 704 (C.A. 9); *Lopez* v. *United States*, 186 F. 2d 707 (C.A. 9). But petitioner's motion to correct his sentences may also be considered as having been made under the first sentence of Rule 35, F. R. Crim. P., which provides that "The court may

SUMMARY OF ARGUMENT

The misdemeanor provision of Section 1708 applied only to offenses involving an "article or thing" which had been abstracted from an item of mail. This view is consistent with the literal reading and with the purpose of the statute.

Section 1708 consists of four paragraphs. The first three define offenses and the last one prescribes the penalties for those offenses. Stealing from the mails, which is the first one defined in the section, is divided into two offenses, each separately defined: (1) stealing "any letter, postal

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correct an illegal sentence at any time". This provision continued "existing law" (Rule 35, note). At common law a sentence which the judgment did not support, or any sentence which the face of the record showed to be illegal, could be corrected at any time, for such sentences were void. *United States* v. *Bradford*, *supra*, 194 F. 2d at 200-201; *De Benque* v. *United States*, 85 F. 2d 202 (C.A. D.C.), certiorari denied, 298 U.S. 681; *Gilmore* v. *United States*, 124 F. 2d 537 (C.A. 10), certiorari denied, 316 U.S. 661; *Waldron* v. *United States*, 146 F. 2d 145 (C.A. 6); *Roscoe* v. *Hunter*, 144 F. 2d 91, 92-93; (C.A. 10); *Ruie* v. *King*, 137 F. 2d 495, 499 (C.A. 8); *Lockhart* v. *United States*, 136 F. 2d 122 (C.A. 6); *Hammers* v. *United States*, 279 Fed. 265 (C.A. 5).

According to petitioner's contention, the sentences are not supported by the judgment. Thus, his attack is appropriate under Rule 35 and hence timely. If petitioner is successful in his contention, his conviction will be reduced from a felony to a misdemeanor. Section 82 of the Virginia Code of 1942 renders incompetent to vote any person who has been convicted of "treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury". It is possible, therefore, that a justiciable controversy remains in the case. See *Fiswick* v. *United States*, 329 U.S. 211, 220-223.

card, package, bag, or mail" and (2) abstracting or removing "from any such letter, package, bag, or mail, any article or thing contained therein." In defining each of the other offenses, all of the nouns used to designate mail matter involved in these first two offenses are repeated. Thus, on four occasions the words "article or thing" are employed to designate objects of mail matter which are, or at the time of the offense had been, abstracted from a whole unit of mail, while the terms "letter, postal card, package, bag, or mail" are five times used to designate whole units of mail.

The fourth paragraph of the section made all of the offenses felonies with five years' imprisonment as punishment, except that where "the value or face value of any such article or thing does not exceed $100", the offense was a misdemeanor carrying a one-year penalty. Hence, "such article or thing" in the misdemeanor provision referred to the term "article or thing" as repeatedly employed in the first three paragraphs of the section, and the provision was limited to offenses involving an "article or thing" which had been contained in, but removed from, a letter, package, bag, or other whole unit of mail, and did not apply to offenses involving intact units of mail.

There is nothing in the meager legislative history of Section 1708 that indicates a legislative intention contrary to its literal terms.

The distinction made by Congress is a logical one. Where a person steals an object abstracted

from a unit of mail, he knows the value of the object involved in the offense, so that the degree of criminality of his act depends on the value of that object. But where the item involved in the offense is an intact unit of mail, the offender's criminal intent has no relationship to the value of the stolen mail matter.

This distinction is more in accord with the historical position of Congress with respect to mail theft. From 1872 until the 1948 revision, the theft of any letter from the mails was a felony, carrying a penalty of up to five years' imprisonment. It is unlikely that Congress intended to reduce the offense of stealing a letter, which usually has no pecuniary value, to a misdemeanor.

The distinction in the statute is important in a practical way. When something is stolen from the mail it is still possible for the mail to be delivered, but where the entire mail matter is taken, the mail service breaks down at that point. In addition, the theft of an article or thing from mail matter will ordinarily be discovered immediately upon delivery, whereas it will often be difficult to discover the theft of mail itself.

ARGUMENT

The Misdemeanor Provision of Section 1708 Applied Only to Offenses Involving an "Article or Thing" Which Had Been Abstracted or Removed from a Letter or Package, Not to Offenses Involving Intact Units of Mail.

It is the Government's position that the misdemeanor provision of Section 1708 applied only to offenses involving an "article or thing" which the

offender abstracted, or which had been abstracted at the time of the offense, from an item of mail. This view is consistent with the literal reading and with the purpose of the statute.

Section 1708 consists of four paragraphs. The first three define offenses and the last one prescribes the penalties for those offenses. The offenses are: stealing from the mails or otherwise fraudulently obtaining mail matter, destroying mail matter, knowingly receiving stolen mail matter, and knowingly possessing and concealing stolen mail matter. Stealing from the mails, the subject covered by the first paragraph, is divided into two offenses, each separately defined: (1) stealing "any letter, postal card, package, bag, or mail" and (2) abstracting or removing "from any such letter, package, bag, or mail, any article or thing contained therein". In defining each of the other offenses, all of the nouns used to designate mail matter involved in the two "stealing offenses" are repeated, i.e., "any letter, postal card, package, bag, or mail, or any article or thing contained therein". Thus, on four occasions the words "article or thing" are employed to designate objects of mail matter which are, or at the time of the offense had been, abstracted from a whole unit of mail, while the words "letter, postal card, package, bag, or mail" are used five times to designate whole units of mail. In no place in these three paragraphs which define the offenses are the words "article or thing" used to indicate intact

units of mail. And where reference is made to previously mentioned mail matter, the appropriate, and only the appropriate, nouns are carefully repeated. Thus, in defining the offense of abstracting from the mails, reference is made to abstraction from previously mentioned whole units of mail by employing the phrase, "such letter, package, bag, or mail". The term "postal card", which had been mentioned previously but which could not contain any "article or thing", was properly and carefully omitted. Again, in the first paragraph, reference is made to all previously mentioned mail matter by the phrase, "such letter, postal card, package, bag, or mail, or any article or thing contained therein". The fourth paragraph of the section made all the offenses felonies with five years' imprisonment as punishment, except that where "the value or face value of any *such article or thing* does not exceed $100" the offense was a misdemeanor carrying a one-year penalty. (Emphasis added.)

We think the misdemeanor provision did not apply to offenses, as here, involving intact letters, packages, bags, or other whole units of mail. This construction of the statute is its grammatical reading. The word "such" as used in the misdemeanor provision to modify "article or thing" is a relative adjective, thus referring to an antecedent, and it limits the object to the same degree as the antecedent was particularized (Black's Law Dictionary, Third Ed., p. 1674). Hence, "such article or

thing" in the misdemeanor provision refers to the term "article or thing" as repeatedly employed in the first three paragraphs of the section, and the term is limited to offenses involving an "article or thing" which had been contained in, but removed from, a letter, package, bag, or other whole unit of mail. For "article or thing" when used as the antecedent was so particularized or described.

The construction contended for by petitioner that "such article or thing" in the misdemeanor provision refers to all the items of mail matter previously mentioned, is an unnatural one. That very term is repeatedly and consistently employed in the first three paragraphs to designate objects abstracted from whole units of mail, while intact units of mail are carefully and repeatedly designated as "letter, postal card, package, bag, or mail". And, as we have pointed out, where Congress intended, in the first paragraph, to refer back to all these objects, they were all repeated. Thus, not only is "article or thing" as used in the first three paragraphs the grammatical antecedent of that term in the misdemeanor provision, but the careful and accurate selection of terms throughout the section indicates that this limitation of the misdemeanor provision to the offenses involving abstracted articles or things was not inadvertent.

Although it frequently is stated that a penal statute must be strictly construed, this principle does not mean that a statute must be given its nar-

rowest possible meaning; it is satisfied if words are given their fair meaning. *United States* v. *Brown*, 333 U.S. 18, 26; *United States* v. *Giles*, 300 U.S. 41, 49; *Singer* v. *United States*, 323 U.S. 338, 341-342. Cf. *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221.

Nor is there anything in the meager legislative history of Section 1708 which indicates a legislative intention contrary to its literal terms. Prior to the 1948 revision all the offenses defined by Section 1708 were felonies (Act of February 25, 1925, 43 Stat. 977; Act of August 7, 1939, 53 Stat. 1256, 18 U.S.C. [1940 ed.] 317. The reviser's note simply states that "The smaller penalty for an offense involving $100 or less was added", and refers to the notes under Sections 641 and 645 of the title. This statement says no more than that the misdemeanor provision was added; it does not purport to define the scope of the new provision. The notes under Sections 641 and 645 (which are the first two sections in Title 18 to which a misdemeanor provision was added) merely attempt to justify the addition by the revisers, within the scope of their function, of a misdemeanor provision. See also House Report No. 304, 80th Cong., 1st sess., pp. 2, 7. The reference to these notes, also made in the notes to approximately 27 other sections,[4] was

[4] Although the reviser generally followed a policy of adding misdemeanor provisions to embezzlement and theft statutes because the latest enactment of that type of statute contained such a provision, the misdemeanor provision was not added in

for the purpose of showing the reviser's reason for adding the misdemeanor provision, not to show the scope of that provision.[5]

The distinction made by Congress between an offense involving an intact unit of mail, which is always a felony, and an offense involving objects abstracted from mail, which is graduated on the basis of the value of the object, is a reasonable one. Where a person steals, or buys, or destroys an object abstracted from a unit of mail, he knows the value of the object involved in the offense, so that the criminality of his act depends on the value of that object. But where the item involved in the offense is an intact unit of mail, the offender's criminal intent has no relationship to the value of the objects contained therein, for he does not know their value. He intends to steal whatever of value they may contain. In the latter case, the criminality of the act is not dependent on or related to the value of the concealed objects, and a graduated

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all cases. See, *e.g.*, Sections 153, 660, 1709 of Title 18. Cf. these sections with Sections 645, 648, 653, 654, 656 of the Title where the misdemeanor provision was added. The misdemeanor provision of Section 661 applies only to some of the offenses defined by that section.

[5] The 1952 Senate Committee report (S. Rep. 980, 82d Cong., 1st sess.), relied on by petitioner to support his construction (Br. 10-11), does not purport to deal with an interpretation of the misdemeanor provision, but is only a declaration against the basic policy of making any violation of the statute a misdemeanor. In any event, the Committee's view in 1952 would not, of course, shed any light on the intention of the prior Congress when it enacted the statute in 1948.

penalty would be improper. (Cf. H. Rep. 1674, 82d Cong., 2d sess.).[6]

This distinction, which appears in the literal reading of the section, is fortified by the fact that it is more in accord with the historical position of Congress with respect to mail theft. From 1872 until the 1948 revision of the criminal code the theft of any letter from the mails, without regard to its value, was a felony, carrying a penalty of up to five years' imprisonment. Act of June 8, 1872, Section 281, 17 Stat. 318-319; Revised Statutes (1873-1874), Section 5469; Revised Statutes (1878 ed.) Section 5469; Act of March 4, 1909, Section 194, 35 Stat. 1125; Act of February 25, 1925, 43 Stat. 977; Act of August 7, 1939, 53 Stat. 1256. After 1909, and until the 1948 revision, all of the offenses now defined by Section 1708 were felonies (*ibid.*), and on July 1, 1952, Congress returned to its historic position by deleting the misdemeanor provision from the section, *supra*, p. 3, n. These statutes reflect the traditional attitude of Congress as to strict preservation of the integrity of the mail, especially with respect to communications as

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[6] The provision of Section 1708 making felonies of all thefts of letters and other intact units of mail, while graduating the penalty as to abstractions therefrom on the basis of the value of the abstracted articles or things, is similar in principal to the provisions of a precursor of that section. See Section 281 of the Act of June 8, 1872, 17 Stat. 318 (continued in Section 5469, R.S.), which made it a felony to steal mail regardless of its value, while opening, destroying, embezzling, or fraudulently obtaining mail, were made felonies only if the mail contained something of value.

distinguished from the transportation of property. The sanctity and integrity of the United States mail has long been a source of national pride and a primary factor in the development of a free society.

In the light of this history, it seems unlikely that Congress intended to reduce to a misdemeanor the offense of stealing letters and other correspondence from the mails. Yet the construction contended for by petitioner would have that effect, for a letter, though of perhaps incalculable intangible value to the sender or addressee, usually has no pecuniary value. On the other hand, the distinction made in the literal language of the statute maintains in a very practical way the traditional position of Congress with respect to the theft of letters. The primary purpose of Section 1708 is to punish mail theft where the object of the offender is to obtain valuable property. It is unlikely that such a thief would abstract a valueless letter, while he might take an intact letter in the hope and expectation that it would contain something of pecuniary value. Moreover, when something is stolen from mail it is still possible for the mail to be delivered, but where the entire mail matter is taken, the mail service necessarily breaks down at that point. In addition, the theft of an article or thing from mailed matter will ordinarily be discovered immediately upon delivery, whereas it will often be difficult to discover the theft of mail itself. The theft of mail itself is a more serious threat to the in-

tegrity of the United States mails than the stealing of an "article or thing" from the mails.

The literal reading of the statute, adopted by both courts below, is in closer accord with the historical position of Congress with respect to the theft of letters than that contended for by petitioner. The view placing a broad interpretation on the misdemeanor provision in Section 1708 adopted by the Ninth Circuit in *Armstrong* v. *United States*, 187 F. 2d 954, on which petitioner relies, ignores the historical position of Congress. No Congressional intention to apply the reduced penalty to situations not encompassed by the literal terms of the statute can be found. We submit that the construction placed on the statute by the court below is the only one in accord with the sole expression of Congressional intention, i.e., the language of the statute.

CONCLUSION

We therefore respectfully submit that the judgment of the court below should be affirmed.

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